IN THE

Supreme Court of the United States

October Term, 1971

No. 71-829

LEILA MOURNING,

Petitioner,

vs.

FAMILY PUBLICATIONS SERVICE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioner, Leila Mourning, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 27, 1971.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto, p. 6a. The opinion of the District Court for the Southern District of Florida, which is not reported, appears in the Appendix hereto, p. 1a.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered on September 27, 1971, and appears in

the Appendix hereto, p. 24a. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether the Federal Reserve Board acted within its statutory authority when it promulgated 12 C.F.R. §226.2 (k), defining "consumer credit" covered by the Consumer Credit Protection Act to include any credit payable in more than four installments?

2. Whether the Federal Reserve Board acted consistent with the Fifth Amendment when it promulgated 12 C.F.R. §226.2(k), defining "consumer credit" covered by the Consumer Credit Protection Act to include any credit payable in more than four installments?

Statutory Provisions and Regulations Involved

United States Code, Title 15, §1601, 82 Stat. 146 (1968):

> §1601. Congressional findings and declaration of purpose
>
> The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.

United States Code, Title 15, §1602(e), 82 Stat. 146:

(e) The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

United States Code, Title 15, §1602(f), 82 Stat. 146:

(f) The term "creditor" refers only to creditors who regularly extend, or arrange for the extension of, credit for which the payment of a finance charge is required, whether in connection with loans, sales of property or services, or otherwise. The provisions of this title shall apply to any such creditor, irrespective of his or its status as a natural person or any type of organization.

United States Code, Title 15, §1602(g), 82 Stat. 146 (1968):

(g) The term "credit sale" refers to any sale with respect to which credit is extended or arranged by the seller. The term includes any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is of the aggregate value of the property and services involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract.

United States Code, Title 15, §1604, 82 Stat. 148 (1968):

The Board shall prescribe regulations to carry out the purposes of this subchapter. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and

exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

United States Code, Title 15, §1631, 82 Stat. 152 (1968):

(a) Each creditor shall disclose clearly and conspicuously, in accordance with the regulations of the Board, to each person to whom consumer credit is extended and upon whom a finance charge is or may be imposed, the information required under this part.

United States Code, Title 15, §1638(a), 82 Stat. 156 (1968):

§1638. Sales not under open end credit plans—Required disclosures by creditor

(a) In connection with each consumer credit sale not under an open end credit plan, the creditor shall disclose each of the following items which is applicable:

(1) The cash price of the property or service purchased.

(2) The sum of any amounts credited as downpayment (including any trade-in).

(3) The difference between the amount referred to in paragraph (1) and the amount referred to in paragraph (2).

(4) All other charges, individually itemized, which are included in the amount of the credit extended but which are not part of the finance charge.

(5) The total amount to be financed (the sum of the amount described in paragraph (3) plus the amount described in paragraph (4)).

(6) Except in the case of a sale of a dwelling, the amount of the finance charge, which may in whole or in part be designated as a time-price differential or any similar term to the extent applicable.

(7) The finance charge expressed as an annual percentage rate except in the case of a finance charge

(A) which does not exceed $5 and is applicable to an amount financed not exceeding $75, or

(B) which does not exceed $7.50 and is applicable to an amount financed exceeding $75.

A creditor may not divide a consumer credit sale into two or more sales to avoid the disclosure of an annual percentage rate pursuant to this paragraph.

(8) The number, amount, and due dates or periods of payments scheduled to repay, the indebtedness.

(9) The default, delinquency, or similar charges payable in the event of late payments.

(10) A description of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates.

12 C.F.R. §226.2(k):

(k) "Consumer credit" means credit offered or extended to a natural person, in which the money, property, or service which is the subject of the transaction is primarily for personal, family, household, or agri-

cultural purposes and for which either a finance charge is or may be imposed or which pursuant to an agreement, is or may be payable in more than 4 instalments. "Consumer loan" is one type of "consumer credit."

12 C.F.R. §226.2(l):

(l) "Credit" means the right granted by a creditor to a customer to defer payment of debt, incur debt and defer its payment, or purchase property or services and defer payment therefor. (See also paragraph (bb) of this section.)

12 C.F.R. §226.2(m):

(m) "Creditor" means a person who in the ordinary course of business regularly extends or arranges for the extension of consumer credit, or offers to extend or arrange for the extension of such credit.

Statement of the Case

Petitioner is a seventy-three year old widow residing in Dade County, Florida. On August 19, 1969, she entered into a contract with the Family Publications Service, Inc., (hereinafter "FPS"), a Delaware corporation engaged in interstate commerce, for the purchase of certain magazines. The contract was the result of a telephone solicitation made to petitioner followed up by a solicitation at her home. Petitioner made an initial payment of $3.95, and contracted to pay an equal amount monthly for a period of thirty months. FPS agreed that petitioner would receive 4 magazines for a period of sixty months.

The contract, made on a standard printed form supplied by FPS, did not disclose to petitioner the total purchase

price of the magazines—$122.45. Nor did it disclose the balance due after the initial payment, $118.50, or reveal other information or use terminology required by the Consumer Credit Protection Act, 15 U.S.C. §§1601 *et seq.* Petitioner was required to state in writing information normally used in a credit check, such as her occupation and business address, and an agent of FPS wrote on the contract "Own 4 years", apparently indicating the period time which petitioner had owned her home.

The sale of magazine subscriptions under similar circumstances is agreed to be FPS's sole business and source of income. FPS contracts with the magazine publishers to supply magazines directly to its customers, and FPS periodically reimburses the publishers out of the payments received from subscribers. What portion of a subscriber's payments are paid to the publishers and what portion retained by FPS is not disclosed by the record.

Shortly after entering into this contract petitioner, apparently realizing for the first time the large amount of money involved, refused to make further payments. Thereafter petitioner received at least five dunning letters from FPS demanding at first a resumption of monthly payments and then payment of the full $118.50 balance. The letters stressed that petitioner had "a credit account", warned of the "embarrassment" of having her name appear on a "monthly delinquent report", and threatened "expensive and unpleasant" legal action.

On April 23, 1970, petitioner, then represented by the Legal Services Senior Citizens Center, brought this action in the United States District Court for Southern District of Florida alleging that the contract violated the Consumer Credit Protection Act. Jurisdiction of the District Court was invoked under 15 U.S.C. §1640(e) providing for federal jurisdiction of actions arising under the Act. Petitioner de-

manded $100 in statutory damages, legal fees, and costs.* FPS urged, inter alia, that it was not required to make any disclosures because the transaction with petitioner did not involve a finance charge and was thus not covered by the Act. Petitioner maintained that she was not required to prove that the $122.45 total cost included a hidden finance charge because the applicable regulation, 15 C.F.R. §226.2 (k), required disclosure whenever, as here, the contract was payable in four or more instalments.

In connection with the proceedings in the District Court petitioner filed affidavits of the Director and an Inspector of the Consumer Protection Division of Metropolitan Dade County. The affidavits stated that the Consumer Protection Division had received over 100 complaints about FPS's practices, that to entice potential subscribers FPS falsely represented it was giving away free 5 year subscriptions to "Life" magazine, that those entering into contracts with FPS would not have done so had they known the full contract price, that FPS refused to permit subscribers to cancel contracts and used threatening and harassing tactics to enforce them. The affidavit of the Director further states that on July 29, 1970, defendant and two of its employees were convicted in Dade County Criminal Court of misleading advertising and that FPS was ordered to cease doing business in the State of Florida.

On November 27, 1970, the District Court held that the four instalment rule set out in section 226.2(k) was valid and applicable to the facts of this case, and granted petitioner's motion for summary judgment for $100 statutory damages plus costs and a reasonable attorney's fee. On September 27, 1971, the Court of Appeals reversed on the

* The action was originally denoted a class action. The District Court denied class action treatment, and petitioner did not appeal from that decision.

sole ground that the four instalment rule contained in Regulation §226.2(k) was invalid and that FPS was therefore not required to make any disclosures.

Reasons for Granting the Writ

Title I of the Consumer Credit Protection Act, also known as the Truth in Lending Act, was enacted in 1968 "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C. §1601. The Act requires certain specified disclosures to be made in all credit contracts, authorizes the Federal Reserve Board to prescribe regulations under the Act, and provides for enforcement by a variety of administrative agencies and by private litigation. The decision of the Fifth Circuit invalidated a major regulation which the Federal Reserve Board has found to be essential to prevent circumvention of the Act. The Fifth Circuit's erroneously constricted view of the Board's rule making authority threatens the continued vitality of the Act, is in direct conflict with the well reasoned decision in *Strompolos* v. *Premium Readers Service*, 326 F. Supp. 1100 (N.D. Ill. 1971), and has brought about serious uncertainty as to the legal obligations of thousands of creditors which only this Court can resolve.

The only issue in this case is whether the transaction between petitioner and FPS is the type of transaction in which disclosures are legally required. FPS concedes that it did not disclose to petitioner the total purchase price of the magazines or several other items of information required in transactions falling under the Act and regulations. While the delineation of the types of transactions subject to disclosure requirements depends on several definitions,

statutory provisions and regulations, the instant petition concerns regulation §226.2(k). That regulation provides in pertinent part:

> "Consumer credit" means credit . . . for which a finance charge is or may be imposed or which pursuant to an agreement, is or may be payable in more than 4 installments . . . .

The District Court, in granting petitioner's motion for summary judgment, concluded that consumer credit was involved because the transaction involved 30 installments and thus fell under the second clause quoted, known as the four installment rule. The District Court did not consider whether the transaction might also involve consumer credit because of the presence of a finance charge.

The Court of Appeals reversed the judgment for petitioner below on the sole ground that the four installment rule on which the District Court had relied was invalid. The Court of Appeals reasoned that, since the definition of a "creditor" in the statute, 15 U.S.C. §1602(f), includes only creditors extending credit for a finance charge, the Act could only be applied to creditors who were proven to have imposed a finance charge in each particular case. The Court concluded that the four installment rule purported to require disclosures in cases not involving finance charges and was therefore outside the authority of the Board and involved an unconstitutional conclusive presumption that a finance charge was present in every transaction involving more than four installments. (See pp. 16a-23a). The decision of the Fifth Circuit is in direct conflict with that more than four months earlier in a case involving virtually identical facts, *Strompolos* v. *Premium Readers Service*, 326 F. Supp. 1100 (N.D.Ill. 1971).* The Court of

* *Strompolos* is now on appeal before the Seventh Circuit Court of Appeals.

Appeals, however, neither mentioned *Strompolos* nor purported to consider the detailed reasoning given therein for upholding the validity of regulation §226.2(k).

Assuming, *arguendo*, that Title I of the Consumer Credit Protection Act is concerned primarily with disclosures in transactions involving finance charges, the four installment rule embodied in §226.2(k) is nonetheless well within the statutory authority of the Board.

The four installment rule is founded upon an explicit and reiterated finding by the Federal Reserve Board that such a rule is essential to prevent wholesale evasion of the Act. In an opinion letter issued eight days after the regulation became effective, Vice-Chairman Robertson of the Board explained:

> The Board considers this to be a rather significant part of the Regulation, intended as a deterrent to those who might cease to charge a finance charge but, instead, inflate their so-called "cash" price and thus avoid compliance. 4 *C.C.H. Consumer Credit Guide*, ¶30,434.

Six months later, on December 9, 1969, Governor Robertson wrote:

> We believe that without this general provision [the four instalment rule] the practice of burying the finance charge in the cash price, a practice which already exists in many cases, would be encouraged by Truth in Lending. In order to prevent this ironic result we felt it imperative to establish the more than four payment rule. 4 *C.C.H. Consumer Credit Guide* ¶30,228.

Again on March 3, 1970, Governor Robertson explained:

> The Board felt that it was imperative to include transactions involving more than four instalments under

> the Regulation since without this provision the practice of burying the finance charge in the cash price, a practice which already exists in many cases, would have been encouraged by Truth in Lending. Consequently we believe that this is a rather important part of the Regulation. . . . 4 *C.C.H. Consumer Credit Guide;* ¶30,320.

See also Hearings Before the Consumer Subcommittee of the House Banking and Currency Committee, 91st Cong., 1st Sess., Part II, p. 375 (1969).

The District Court in *Strompolos* also concluded that the four instalment rule was essential to avoid evasion:

> We agree with the Federal Reserve Board's evaluation of the necessity of this type of regulation.
>
> The facts of this particular case may very well demonstrate why the four installment rule is not only sensible but also necessary to prevent the Truth in Lending Act from being a hoax and a delusion upon the American public. Although the defendant contends that it charges the same unitary price for both credit and cash sales, it is readily apparent that a seller in any industry which sells primarily or almost exclusively on a long term credit basis could easily set a theoretical unitary cash and credit price which he knows no one will pay in less than four installments and thus exempt himself and his industry from the coverage of the Act. . . .
>
> It is most logical that the Federal Reserve Board would . . . plug a loophole by which a substantial portion of long term credit dealers could escape from the Act's coverage. Neither the law, the Federal Reserve Board nor the courts are so simplistic as to

> believe that a person in the business of extending long term credit should be permitted in effect to abolish the Truth in Lending Act by merely charging a single "cash or credit" price knowing full well that the great bulk of its customers will never pay in less than, for example, thirty months.
>
> . . . Were the Board not to have promulgated this rule nor the courts to sustain it, the Truth in Lending Act might never achieve its stated goals. 326 F. Supp. at 1103-04.

The Board's finding that the regulation is essential to prevent wholesale evasion of the Act is not subject to judicial review absent a clear showing of abuse of discretion on the part of the Board. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 224 (1943). The Court of Appeals in the instant case, however, completely ignored both this principle of deference to the Board's expertise and the finding of the Board.

The Court of Appeals reasoned that if the literal definition of "creditor" in 15 U.S.C. §1602 (f) permitted on its face a scheme which would make a shambles of the entire statute, there was absolutely nothing the Board could do about it. This argument seriously misconstrues the purpose of the Act and the authority given to the Board. Congress did not intend to require exactly and only the disclosures set out in the statute under exactly and only those circumstances defined therein, authorizing the Board to merely resolve minor ambiguities. Rather the Congress intended, as it stated, "to assure meaningful disclosure of credit terms", and to this end set out a rough outline of what disclosures it believed would be needed under what circumstances to effectuate this purpose, and left it to the Board to fill in the details, correct any oversights or omissions, and make any necessary exceptions.

The express grant of rule making authority to the Board is extremely broad, and encompasses both interpretative and legislative rules:

> The Board shall prescribe regulations to carry out the purposes of this title. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this title, to prevent circumvention or evasion thereof, or to facilitate compliance therewith. 15 U.S.C. §1604.

The grant of authority to avoid evasion is particularly applicable here. As the District Court reasoned in *Strompolos*:

> The wording of section 105 of the Act [15 U.S.C. §1604] clearly indicates, not only that Congress delegated to the Board authority to issue regulations to effectuate the purposes of the Act, but that Congress also went further and granted the Board the power to promulgate, at its discretion, regulations necessary to prevent *circumvention* of the Act. The use of the word "circumvention" in the Act signifies that Congress was aware that some creditors who would otherwise fall within the purview of the Act might, after passage of the Act, attempt to restructure their consumer business relations in such a manner that they might technically avoid the wording of the Act.
>
> Along with the recognition of this potential for evasion, Congress also recognized the equally obvious fact that no legislative body could conceivably put into a workable piece of legislation regulations and restrictions covering every imaginable business transaction wherein credit may be involved. Consistent with other

> complex regulatory legislation, Congress granted an administrative agency the power to apply the basic purposes of the Act to the everyday world. Not only did Congress order the Federal Reserve Board to promulgate regulations to effectuate the purposes of the Act, it also took the further affirmative step of enabling the Board to reach creditors, who in the Board's judgment, were attempting to circumvent or evade the Act by structuring their credit activities to fall a fine line outside the Act. 326 F. Supp. 1103-04.

Indeed, as the instant case makes clear, if the grant of authority to prevent evasion does not include the power to reach transactions just outside the literal reach of the statute that grant is meaningless.

That Congress should have given the Board the authority to modify the details of its statutory plan is not unusual. Congress could of course have given the Board the rule making authority set out in section 1604, and the broad statement of purpose in section 1601, and left it to the Board to promulgate the entire regulatory scheme. Compare *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943) (F.C.C. authorized to regulate broadcast industry in accordance with "public convenience, interest, or necessity"); *Federal Trade Commission* v. *Gratz*, 253 U.S. 421 (1920) (F.T.C. authorized to define and prevent "unfair methods of competition"). It was entirely proper for the Congress in the instant case to set out, in addition to a statement of the ultimate purpose to be sought by the Board, a sketch of how it thought that goal would be achieved subject to such "variations, extensions, or exemptions" as the Board might find necessary to effectuate the general purpose of the Act. *Davis on Administrative Law* §20; *United States* v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932); *Sproles* v. *Binford*, 286 U.S. 374, 397

(1932); compare *Federal Power Commission* v. *Hope Nat. Gas Co.*, 320 U.S. 591 (1944). It is not, of course, necessary in each individual case for the Board to establish that the creditor is seeking to evade the law. Such a requirement would reduce the Board to proving the existence of a finance charge in each case and render nugatory its power to promulgate *rules* to avoid evasion. The Board need only have a reasonable basis for concluding that its regulation of the class of activities involved is necessary to effectuate the purposes of the Act. Compare *Perez* v. *United States*, 402 U.S. 146 (1971).

The four installment rule is also necessary to avoid hopeless confusion as to when a creditor in FPS's position has imposed a finance charge and is thus required to make disclosures. "Finance charge" is defined broadly in the statute to include "the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit. . . ." 15 U.S.C. §1606(a). As the District Court pointed out in *Strompolos*, 326 F. Supp. at 1103, the fact that a creditor purports to have a cash price equal to his credit price may only mean that the finance charge is well hidden.

As a practical matter any creditor who permits a customer to defer payment of an obligation for goods or services already provided or paid for by the creditor must as a consequence borrow from a third party or his own capital reserves and incur a finance charge or resulting loss of interest. He must also maintain, as FPS evidently did, some form of collection department. The costs of the creditor's borrowing and collections, as well as his bad debt reserve, must ultimately and literally come out of his customer's pockets, since, as in the case of FPS, their

payments to him are his only source of funds, regardless of whether the creditor in any sense "intends" to bury a finance charge in his prices. FPS presumably met all these costs out of the difference between the amount received from its customers and the amount it paid to the magazine publishers. The statute sets no standards, however, for determining the existence and amount of a finance charge under these circumstances, and the Court of Appeals in the instant case intimated no suggestions as to what sort of proof petitioner could have offered along these lines.

Section 226.2(k) resolves this problem as a practical matter by requiring disclosures in all transactions involving more than four installments. The section may be understood as an interpretation of the definition of "finance charge" in Section 1606(a). As such it would reflect the Board's apparent conclusion that it would not be feasible to determine for categories of transactions or on a case by case basis when the price paid by the consumer includes, purposely or otherwise, part of all of the costs necessarily incurred by the creditor in extending credit. See 4 *C.C.H. Consumer Credit Guide* ¶30,228.

In the instant case both the Federal Reserve Board and the Federal Trade Commission, which share the primary responsibility for interpreting and enforcing the Act, believe that the four installment rule set out in §226.2(k) and promulgated within a year of the passage of the Act is a valid use of the Board's general rule making authority. See 4 *C.C.H. Consumer Credit Guide* ¶¶30,114, 30,658. A strong presumption of validity attaches to "a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Prod. Co.* v.

United States, 288 U.S. 294, 315 (1933). The presumption is particularly weighty when the regulation involved is directed at effectuating the ultimate purposes of the Act. *General Telephone Co. of California* v. *Federal Communications Commission*, 413 F.2d 390, 403 (D.C.Cir. 1969).

The decision of the Court of Appeals in the instant case is not only clearly erroneous, but has opened the door to wholesale evasion of the Consumer Credit Protection Act. If the four installment rule is invalidated there will be little if any incentive to prevent merchants from reverting with avengeance to the practices common prior to the passage of the Act, disclosing neither finance charges, interest rates, or total prices for their goods. The success of such a scheme of evasion will give merchants selling on credit a substantial and unwarranted competitive edge over banks and other lenders who have no price in which to bury their finance charges. Such results would have a particularly adverse effect on the poor. Burying finance charges and advertising "free credit" was especially common prior to 1969 in ghetto neighborhoods, and low income consumers are particularly susceptible to these practices because they are least likely to ask the total cost of some good or service so long as the monthly payments seems within their reach. See Comment, "Consumer Legislation and the Poor," 76 *Yale L.J.* 745, 762-63 (1967). Moreover, the Court of Appeals' constricted view of the Board's rule making authority calls into question the validity of, and is likely to precipitate a flury of attacks on the many other regulations with which creditors may prefer not to comply.

The need for a final ruling by this Court on the validity of the four installment rule is particularly great because of the financial stakes involved. The regulation invalidated by the Fifth Circuit is still being enforced in the Northern District of Illinois because of *Strompolos*. Throughout the

rest of the country there is general uncertainty as to whether compliance is necessary in view of the conflict between the instant case and *Strompolos*. A creditor who gambles that the regulation will be invalidated in his Circuit and loses may be liable for millions of dollars in statutory damages. A creditor who presumes incorrectly that the regulation will be held valid in his area stands to lose a substantial amount of business because of the competitive edge assumed by his non-complying competitors. The nine federal agencies charged with enforcing the Act as to various groups of creditors are themselves left in a quandary as to how to proceed pending a final resolution of this question.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

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